From: Rodney M. Chun
To: Microsoft ATR
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Subject: Microsoft Settlement

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FROM:

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To the Honorable Court and the U.S. Department of Justice:

As a concerned citizen, a professional economist, and a database developer, I feel compelled to submit the following comment on the Revised Proposed Final Judgment (RPFJ) issued November 6, 2001 in the case of United States v. Microsoft Corp. I strongly believe that the RPFJ as it now stands is not in the "public interest" due to the gaping loopholes and imprecisions that even an individual not trained in law, such as myself, can identify.

Let me begin with a simple statement of fact: A lower court has found, and an appellate court has concurred that Microsoft has violated antitrust laws by undertaking illegal actions which have impeded effective competition against it. The purpose of the RPFJ is to provide remedies for these transgressions, and most importantly, to inhibit Microsoft from engaging in future activities which would serve to preserve its monopoly in operating systems.

The RPFJ contains such imprecise language that one can only wonder if it was purposely crafted to furnish Microsoft exploitable loopholes. While the list that follows is far from exhaustive, I feel it summarizes some of the shortcomings, omissions, and definitional problems which render the RPFJ an inappropriate remedy for the harm Microsoft has done to the public and an ineffective deterrent to future Microsoft offenses. Specific references to sections of the RPFJ are given in parenthesis.

1. The RPFJ does not include all of the conduct the court found to be in violation of antitrust laws. In particular, it does not address the issue of commingling of middleware code with the underlying operating system.

2. The RPFJ gives Microsoft the sole discretion over the definition of the "Windows Operating System" (VI.U). This oversight combined with the previous point essentially gives Microsoft every incentive to embed middleware code, such as the Internet Explorer, into the "operating system" and thereby evade all restrictions imposed on its middleware products.

3. The RPFJ's definition of "application programming interface" (API) is unorthodox and restrictive. Typically an API is the interface between an application program and the operating system. Yet the RPFJ (VI.A) defines an API to be only those interfaces used by Microsoft Middleware. There are over 13,000 API "hooks" into the Windows Operating System, of which only a fraction is actually used by Microsoft Middleware. Hence, any directives to make API's (as defined by the RPFJ) public, potentially excludes the release of information regarding other useful Windows OS APIs -- the lack of which could essentially make an ISV's product uncompetitive with a similar Microsoft product. Microsoft has already used this informational asymmetry to its advantage in the past (see Finding of Fact, 90, 91) and there is no reason to believe that it would refrain from using this ploy to illegally preserve its monopoly in the future.

4. The RPFJ's definition (VI.K) of "Microsoft Middleware Product" essentially consists of Internet Explorer, Microsoft Java, Window Media Player, Windows Messenger, and Outlook Express. This list is grossly incomplete if one considers middleware to be any application software that

itself presents a set of APIs that allow users the ability to write new applications without reference to the underlying operating system. For instance, one can write database applications using Microsoft Access and Visual Basic for Applications (VBA) without ever using a native Windows OS API. This applies to the entire Microsoft Office family of programs. Furthermore, I find it peculiar that Outlook Express is listed while Outlook (the full-featured version of Outlook Express) is omitted. Furthermore, Microsoft's ".NET" system -- seen by most as a Microsoft version of Sun's Java -- is also noticeably omitted.

5. The RPFJ gives Microsoft the explicit right to continually and automatically persuade end users to revert back to Microsoft middleware, after 14 days, in the event that a 3rd party application has been installed. As an end user of Microsoft Windows, I do not welcome a daily barrage of dialog boxes begging me to favor Microsoft products over my preferred alternative. I find it objectionable that any software company should be encouraged to engage in this type of marketing just as I am opposed to telemarketing phone calls, Email spam, or unsolicited junk mail.

6. The RPFJ is deeply flawed with regard to enforcement. The proposed remedy lasts five years with a minor sanction of a one-time extension of two years in the event of non-compliance. It is extremely naive to believe that Microsoft will cease to be a monopoly in five years -- and will thereby have insufficient market power to engage in illegal behavior to preserve its monopoly -- particularly considering the large network effects and complementarities that exist in software products. Microsoft has been declared a monopoly. As long as it remains a monopoly, it should be regulated as such until Microsoft can prove itself otherwise. The inclusion of an expiration date for sanctions serves to ameliorate most of the effect the remedy proposes to offer. Furthermore, I see no concrete penalties whatsoever in terms of non-compliance. While I am not an expert in contract law, even I know that a contract must clearly specify the penalties for violations of the agreement. In the absence of such sanctions, the document is little more than a wish list.

My list of objections to the current RPFJ is not exhaustive, and I have only focused on the problems I find most obvious. Further comprehensive evaluation is available in the comments made by the economists Robert E. Litan, Roger D. Noll, and William D. Nordhaus (January 17, 2002; available from the American Antitrust Institute web site). In addition, another excellent analysis done by Dan Kegel is available at:

http://www.kegel.com/remedy/remedy2.html

I agree with the comments in both of these documents.

In closing, let me leave you with a parable that summarizes some of the shortcomings in the RPFJ. In my parable a large 18-wheel truck is speeding and weaving down an interstate highway. Do to its recklessness, several car accidents have occurred in its wake, and a state highway patrol car has pulled the truck over. The cop is informed by his superior to apply the relevant traffic laws, which, in my story, have been modeled on the RPFJ. Here is what the traffic cop reads in his codebook:

- The traffic law allows the driver of the truck the right to define what a "truck" is.
- The traffic law is not clear on which part of the truck is actually defined to be speeding.
- The traffic law suggests a fine of $1 since the damage only consisted of "compact" cars.
- The traffic law only mandates that the driver obey the speed limit for the next 5 miles. Any further transgressions will result in this restriction applying for 2 more miles. After the maximum of 7 miles, the truck driver can do anything he wishes. Furthermore, the traffic law is completely silent on what the penalty will be for further violations.
- The traffic law allows the driver to demand back his $1 fine after 14 days.

The US Department of Justice has won a historic ruling against Microsoft, a victory which has been largely upheld by the appellate Court; Microsoft has been found guilty of engaging in illegal activities in its attempt to preserve a monopoly position in the software industry. As a result of these activities, it has most certainly increased its monopoly power and has done unfathomable damage to the development of innovative technologies and new products which may have existed, but for Microsoft's actions. I urge the US Department of Justice to withdraw its consent from the present RPFJ. Any new settlement should address the current RPFJ's obvious shortcomings. As it stands, it will not unfetter the market from Microsoft's anticompetitive conduct, nor will it properly penalize Microsoft for its past behavior.

Sincerely,

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